STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

1410 North Hilton • Boise, ID 83706 • (208) 373-0502
www.deq.idaho.gov

Brad Little, Governor
John H. Tippets, Director

MEMORANDUM

TO: Regional Administrators, Surface Water Managers, 401 WQ Certification Staff

FROM: Barry Burnell, Water Quality Division Administrator

DATE: 4/1/2019

SUBJECT: ACOE Policy Directive on the 60-day Deadline for 401 Certification Request

Background: As the Army Corps of Engineers (ACOE) process dredge and fill permits, a waiver of certification may be explicit or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty (60) days after receipt of such a request <u>unless the district engineer determines a shorter or longer period is reasonable for the state to act</u> [33 CFR § 325.2 (b)(1)(ii)].

In the past, DEQ has periodically relied on ACOE to provide us additional time in order to collect supplementary project information, especially for large, complex dredge and fill projects.

An Army Corps of Engineers memo dated December 13, 2018 outlines that the ACOE may be less willing to entertain requests for time extensions on 401 certification requests. ACOE's new regulatory policy directive on the duration of permits and jurisdictional determinations details that "A certifying agency's request for additional time that is based on workload or resource issues or that they do not have enough information to proceed <u>would not be valid reasons for consideration</u> [for a project extension]."

401 Certification: Per this new policy directive, ACOE might not authorize a time extension for a draft 401 certification, even in the event that the information is critical to our antidegradation analysis effort or is essential to providing reasonable assurance that the project will comply with Idaho's water quality standards.

Documentation: It is now imperative that DEQ document <u>all</u> correspondence with ACOE related to extension requests when proceeding with a request for more time to process a dredge and fill 401 certification.

A request for more information should <u>always</u> accompany a request for more time to finalize the draft certification.

Extension Request: In the event that DEQ intends to request additional time to gather information and complete the review of a dredge and fill project, please take the following steps.

- Send an email, accompanied by a certified letter, to ACOE requesting a specified amount of extra time to prepare draft 401 certification. Include specific and detailed reasons for the time extension and list all required documentation in the request.

Once the request is received, DEQ will act on a 10-day timetable to get a determination from ACOE. If ACOE grants the extension request, DEQ will need to complete the 401 certification action (approved, approved w/ conditions, or denial w/o prejudice) by the extended deadline. If ACOE has not granted DEQ an extension within 10 calendar days, DEQ will proceed with a 401 certification denial without prejudice for the dredge and fill project.

In the event that the time extension is refused:
- Obtain written correspondence from ACOE detailing that no additional time is granted.

- Once the time extension request is refused, or the 10-day deadline has passed, DEQ will proceed to deny the certification without prejudice, which will allow the applicant to request certification again after the proper supporting documentation is included along with the application. The certification denial should detail the information lacking in ACOE's joint application information package as it is featured in DEQ's original extension request letter.

This procedure will ensure that DEQ has pursued all avenues to obtain information required for 401 certification in order to make a proper determination about the impacts of the dredge and fill project. By making every effort to work with ACOE's new directive, we can ensure that DEQ does not start to waive 404 dredge and fill projects because adequate information was not received early enough to meet the 60-day deadline.

BNB/lm